BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

NINFA R. MARTINEZ, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	)	**IC 00-021023** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed: November 18, 2005

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Twin Falls, Idaho, on June 16, 2005. Kevin E. Donohoe of Ketchum represented Claimant. Thomas B. High of Twin Falls represented Defendant Industrial Special Indemnity Fund (ISIF).[1] The parties submitted oral and documentary evidence. No post-hearing depositions were taken and the parties submitted post-hearing briefs. The matter came under advisement on September 6, 2005, and is now ready for decision.

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether the ISIF is liable under Idaho Code § 72-332;

2. Whether Claimant is entitled to permanent total disability pursuant to the odd-lot doctrine; and,

3. Whether apportionment is appropriate under the *Carey* formula.

[1] Employer and Surety entered into a lump sum settlement with Claimant prior to hearing.

CONTENTIONS OF THE PARTIES

Claimant asserts she had pre-existing impairment of the right shoulder and hands prior to her July 2000 work-related accident. Despite her impairment, she was able to work. Since the July 2000 accident, however, Claimant's pain has become intolerable. Claimant argues that the injuries she received in the July 2000 accident combine with her pre-existing impairment to make her totally and permanently disabled. Claimant seeks contribution from ISIF for a portion of her total disability benefits pursuant to statute.

Defendant denies it is liable to Claimant for disability benefits because she does not meet the statutory criteria for imposition of ISIF liability: Claimant sustained no permanent disability from the July 2000 work-related accident. Her injury was merely transitory, and she sustained no permanent disability from the July 2000 accident. Therefore, there is no subsequent disability to combine with her pre-existing injury to render her totally and permanently disabled. Finally, Defendant argues that Claimant does not meet any of the statutory criteria for odd-lot status and cannot claim total permanent disability as an odd-lot worker.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at hearing;
2. Joint Exhibits A through Z and AA through DD admitted at hearing; and
3. The Industrial Commission legal file.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

CLAIMANT

1. At the time of hearing, Claimant was 66 years of age and living in Burley, Idaho. She attended school through the sixth grade and then did migrant farm work with her family. Her ability to read and write English is limited. Later in life, Claimant worked as a bean sorter and a potato inspector.

2. In 1990, Claimant went to work at Minidoka Memorial Hospital (MMH) where she did heavy housekeeping. Claimant had a work-related accident while employed at MMH in 1995—she slipped and fell, injuring her right shoulder. Claimant subsequently underwent three rotator cuff surgeries on her right shoulder. She returned to light duty work at MMH after her first two surgeries. Following the third surgery, in 1999, Claimant left MMH because it could not provide her with appropriate light duty work.

3. During the time Claimant worked at MMH, she also worked cleaning private homes, including vacuuming, dusting, and cleaning bathrooms and kitchens.

4. In May 2000, Claimant went to work for Parke View Care and Rehabilitation, Claimant's Employer at the time of the industrial accident that gives rise to this claim. She performed light-duty housekeeping, including cleaning resident rooms, dusting, and vacuuming.

5. On July 3, 2000, while she was at work, Claimant slipped on the wet dining room floor and fell, injuring her back and buttocks. Claimant reported the accident without delay, but did not seek medical care for seven months. Claimant continued to work for Employer full-time until February 2001.

6. Starting in November 2004, Claimant performed light house work for three individuals on a bi-weekly basis. She worked approximately nine hours in each two-week

period. Claimant stopped her housecleaning work approximately two months prior to the hearing in this matter.

TREATMENT FOLLOWING JULY 2000 ACCIDENT

7. In October 2000, Claimant was seen twice at Family Health Services. There is no mention of complaints of back pain on either visit.

8. Claimant first complained of back pain that she attributed to her July 2000 fall when she saw Joe Peterson, M.D., in February 2001. When asked why she waited so long to seek medical care, Claimant responded, "Well, I thought it would go away. I mean, I had a little pain, but I thought it would go away." Tr., p. 27. An MRI done on February 1, 2001 showed advanced degeneration at L1-2, L2-3 and L3-4, mild degenerative changes at L4-5, and advanced chronic degenerative changes at L5-S1. The radiologist diagnosed:

> Advanced multi-level lumbar disc degeneration associated with posterior annular bulging and some parallel spondylitic ridging. This is most prominent at L5-S1 where both of the lateral recesses show some narrowing.

Exhibit C, February 1, 2001 MRI Report.

9. Dr. Peterson referred Claimant first to physical therapy and when the physical therapy did not help, to Clinton L. Dillé, M.D., for a lumbar epidural steroid injection. The injection was not efficacious and Dr. Dillé suggested Claimant see D. Peter Reedy, M.D., a neurosurgeon.

10. Dr. Reedy saw Claimant April 19, took her history, and performed a physical. After reviewing the original MRI images, Dr. Reedy wrote in pertinent part:

> She has *multiple evidence of degenerative disease*, most significant at L5 which may well be responsible for symptoms.

Ex. N, 5/2/2001 History and Physical by Dr. Reedy (emphasis added). Dr. Reedy ordered a myelogram with post myelogram CT to determine whether surgical intervention was appropriate.

The myelogram was consistent with the MRI, and showed mild widespread degenerative lumbar spondylosis. There was no evidence of severe spinal stenosis, foraminal stenosis or herniated nucleus pulposus.

11. In a May 28 letter to Claimant, Dr. Reedy wrote:

> I have tried on multiple occasions to reach you by phone, and have been unsuccessful. I have personally reviewed the myelogram films you had done in Pocatello on 5/2/01, and although there are some *mild aging changes in the spine*, there is nothing there that I can help with an operation.

Id., May 28, 2001 letter from Dr. Reedy (emphasis added).

12. On July 18, 2001, at the request of the surety that is no longer a party, Richard T. Knoebel, M.D., did an IME of Claimant. He opined in pertinent part:

> DIAGNOSIS
> *Severe lumbar degenerative joint disease* with mechanical low back pain.
>
> ***
>
> MAXIMUM MEDICAL IMPROVEMENT
> [Claimant] has not reached maximum medical improvement at this time. [Claimant's] diagnosis is degenerative joint disease. This is a progressive disease. It is expected to continue in a natural progression.
>
> ***
>
> SUBJECTIVE COMPLAINTS
> It is significant that [Claimant's] subjective complaints far outweigh the objective finding in the face of the inconsistencies on physical examination and numerous inappropriate responses to credibility testing. This suggests an amplification of symptoms on a conscious or unconscious basis.
>
> ***
>
> CAUSATION AND APPORTIONMENT
> [Claimant] has a history and notification of injury consistent with a slip and fall on 7/3/00. [Claimant] however, did not seek medical attention in any timely fashion. . . . The six to eight month gap in care is not consistent with the 7/3/00 incident being a significant injury. The x-ray and MRI scan findings do not show any evidence of an injury, either. . . . Rather, the exam findings, diagnostic tests, and medical records indicate non-specific back and right leg complaints consistent

with mechanical low back pain from her *severe pre-existing degenerative joint disease.*

Ex. O, IME letter of July 18, 2001, pp. 6-8 (emphasis added). Dr. Knoebel further opined that because Claimant's current complaints were degenerative and unrelated to the July 2000 injury that an impairment rating was unnecessary, as was a functional capacity evaluation.

13. In August 2001, Claimant returned to Dr. Dillé:

> [Claimant] returns after having seen Dr. Reedy who apparently recommended surgery however, [Claimant] refuses to have surgery and wishes to be treated strictly medically.

Ex. M., August 29, 2001 chart note.[2] Dr. Dillé then put Claimant on various medications, including Vioxx, Elavil and Darvocet. A September chart note indicates:

> [Claimant] having continued pain and has been feeling that the pain seems to be significantly worse with the predominant amount of pain in her right lower back.

Id. at September 26, 2001 chart note. Dr. Dillé gave her a right SI joint injection. On October 10 and 17, she received a right L2 transforaminal epidural and dorsal nerve root block.

14. At the request of Dr. Dillé, David A. Hanscom, M.D., board-certified orthopedist, evaluated Claimant in April 2002. Dr. Hanscom opined in pertinent part:

> Assessment:
> 1. She has some chronic mechanical low back pain. I agree with Dr. Knoebel's examination that she has *degenerative disk disease* and mechanical low back pain. However, he felt that this was nonindustrial which clearly seems to be the case.
> 2. She is also in a chronic pain situation where she really has very widespread global symptomatology with precipitating factors.
>
> ***
>
> Plan:
> 1. From a surgical standpoint I simply do not see the need for further workup. Her symptoms are not very localized in nature. She had no neurologic

[2] This is an incorrect understanding of Dr. Reedy's advice.

complaints and her symptoms in her spine really did not show any structural instability or an [sic] nerve root impingement.

2. I tried to explain to her in some detail. *She was a little bit upset that there was not a surgical solution*.

Ex. P, April 5, 2002 letter, pp. 1, 2 (emphasis added).

15. Later that same month, in a letter to Claimant's counsel, Dr. Dillé opined in pertinent part:

> I feel that [Claimant] is suffering from a chronic pain syndrome. Considering the duration of her pain which has essentially existed since her July 3, 2000 accident, I feel that her back pain and [sic] become quite chronic in nature which is *related to degenerative disk disease* and low back pain that appears to be related to the accident which happened on July 3, 2002. At the present time I feel that the amount of medical treatment required is somewhat limited. I feel that she might benefit from some additional physical therapy and perhaps a work hardening-type program. Also I feel that the restrictions placed on [Claimant] are strictly from a viewpoint of pain and many of her activities such as prolonged standing or sitting or repetitive actions will be markedly limited because of this ongoing pain. If the amount of activities that [Claimant] could do is truly an issue I feel that perhaps a functional capacity assessment would answer these questions far more objectively than I possibly could.

Ex. M., April 24, 2002 letter to Kevin Donohoe (emphasis added).

16. On July 23, 2004, Richard A. Silver, M.D., MBA, did an IME of Claimant, at Claimant's request. Dr. Silver opined in pertinent part as follows:

- Claimant has an impairment of the spine;
- PPI for the spine, based on the *Guides to the Evaluation of Permanent Impairment,* Fifth Ed., (*AMA Guides*), page 404, Table 15.7, is 11% impairment of the whole person;
- Claimant was incapable of gainful employment as of the date of the IME (July 23, 2004);
- Claimant was in need of further care, including cryotherapy, non-steroidal anti-inflammatories, muscle relaxants, and occupational therapy for both upper

extremities, particularly her hands; he recommended an immediate cessation of chiropractic care, and cessation of all heat therapies;

- Claimant's combined permanent impairment is 41% of the whole person, including 11% for the lumbosacral spine, 24% for both hands, and 6% for the right upper shoulder;[3]
- Claimant's spine complaints are not causally related to her July 2000 accident at Park View Care Center [sic].

With regard to this last point, Dr. Silver writes:

> Although [Claimant] may very well have had a *brief exacerbation and aggravation of an underlying condition*, the medical records substantiated by her treating physicians and Richard T. Knoebel, M.D. and David Hanscom, M.D. would preclude her having any kind of specific spine complaints due to diskogenic disk disease.

Ex. S, July 23, 2004 letter, p. 3 (emphasis added).

PRIOR MEDICAL CONDITIONS

17. A brief discussion of Claimant's prior medical history sheds some light on Claimant's responses and behaviors as noted by the physicians who treated and evaluated her lumbar complaints.

Right Rotator Cuff

18. Frederick L. Surbaugh, M.D., operated on Claimant for a right rotator cuff tear caused by her January 1995 work-related slip and fall. In his post-operative notes of August 16 and September 5, 1995, he noted that Claimant "is a little resistive" and "needs to do a little more work passively." Ex. G, August 16, September 5, 1995 chart notes. Also in the September note,

[3] Dr. Silver added the various impairments together to reach his total of 41%. Combining the various impairments as required by the *AMA Guides* using the combined values chart, Claimant's PPI rating is actually 36% of the whole person.

Dr. Surbaugh explained to Claimant who "says she hurt that thumb when she fell" that her thumb pain "was simply a degenerative change." *Id.*

19. In a November 9, 1995 note, Dr. Surbaugh wrote:

> Claimant is doing fair. She is complaining of a lot of pain in her shoulder. I received a letter from Workman's Compensation [sic] defining a light duty position which she says that she absolutely could not do. . . . She was advised that I don't feel that the degenerative change in her carpal/metacarpal joint is related to the industrial accident and that I feel that if she does not try to work out something with her employer to get back to work, even on a light duty status, she is probably going to lose her job. She is now 3 months postop from the surgery for repair for what was a *relatively simple rotator cuff repair*. I think she is somewhat over-determined as she *complained much too bitterly* about the injections into her fingers which were done quite gently with a tiny 27 needle.

Id., at November 9, 1995 chart note (emphasis added). Dr. Surbaugh returned Claimant to work at the light duty laborer position at Minidoka Memorial Hospital as of November 9, 1995.

20. In December 1995, Michael T. Phillips, M.D., a board-certified orthopedist, performed an IME of Claimant at the request of the surety. He gave her a 10% PPI rating of the upper extremity according to the *AMA Guides to Permanent Physical Impairment*, Fourth Ed. Dr. Phillips opined:

> The patient's range of motion studies are inconsistent when compared with medical records and therefore felt to be invalid for impairment rating purposes . . .
>
> ***
>
> I believe the patient can continue in her light work activity at this time. Review of her job site description does not appear compatible with her current physical restrictions. I would recommend no prolonged overhead work activity and lifting limited to 20 pounds maximum unassisted with the affected extremity.

Ex. H, December 12, 1995 Letter.

21. A June 10, 1996 Physician Note from a Dr. Sandison reports that Claimant continued to complain of pain in her right shoulder and left thumb. She was advised that those problems are likely to remain as long as she continues to perform manual labor.

22. On October 10, 1996, John W. Howar, M.D., did a second right rotator cuff repair on Claimant and followed her post-operatively. Later, on March 20, 1997, Claimant had a rupture of the long head of the biceps of the right shoulder. Dr. Howar wrote to the surety:

> This [bicep injury] is unrelated to her rotator cuff injury and subsequent surgeries on the rotator cuff. The biceps rupture is not a disabling injury and full recovery is expected. . .
>
> ***
>
> There is *no permanent impairment of the right shoulder*, as she had regained full motion and full strength following rotator cuff repair on October 10, 1996. As I noted above, no permanent impairment is anticipated due to the right biceps tendon rupture of March 20, 1997.
>
> ***
>
> This patient does have impairment of the right upper extremity due to right ulnar nerve entrapment and there is also an impairment of the left upper extremity due to arthrosis of the basal joint of the thumb. I did not have sufficient data to estimate an impairment rating for either of those conditions.
>
> ***
>
> As regards to work restrictions, [Claimant] was released to light-duty work on April 4, 1997 and she was released for regular work April 23, 1997.

Ex. G, April 12, 1997 letter (emphasis added). Dr. Howar imposed a 20-pound lifting restriction on Claimant.

23. On May 4, 1998, Richard A. Wathne, M.D., did a third rotator cuff repair on Claimant. In an April 5, 1999 letter to attorney Kevin E. Donohoe, Dr. Wathne opined in pertinent part:

> I do believe that vocational re-training would be in her best interest. As far as activity restrictions are concerned, I believe that she should limit all overhead activities, that is to say above the shoulder level. She may lift up to 20 pounds to the shoulder level itself. She should try and refrain from repetitive activities in the right upper extremity, specifically mopping or sweeping type activities.

Ex. L, April 15, 1999 letter. These same concerns are expressed in Dr. Wathne's May 27, 1999 response to a job site evaluation requested by the Industrial Commission Rehabilitation Division (ICRD).

Low Back Pain

24. Chart notes from Troy W. Crane, D.C., indicate he saw Claimant on October 8, 1997 for low back pain. In the Low Back Pain and Disability Questionnaire dated 10/6/96, Claimant chose 8 out of 24 sentences to describe her current situation, including:

- "I change position frequently to try and get my back comfortable."
- "My back is painful almost all of the time."
- "I sleep less well because of my back."
- "I avoid heavy jobs around the house because of my back."

Ex. K, Low Back Pain and Disability Questionnaire, 10/6/97. After treating with Dr. Crane, Claimant responded to a Symptom Review and Treatment Response Analysis dated November 3, 1997. In answer to a question regarding the efficacy of treatment, Claimant responded negatively, and in a re-evaluation of the Low Back Pain and Disability Questionnaire on the same date, Claimant marked the same eight responses she had on the earlier Questionnaire.

DISCUSSION AND FURTHER FINDINGS

ISIF LIABILITY

25. Idaho Code § 72-332(1) provides that if an employee who has a permanent physical impairment from any cause or origin incurs a subsequent disability by injury arising out of and in the course of his or her employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury suffers total and permanent disability, the employer and its surety will be liable for payment of compensation benefits only for the

disability caused by the injury, and the injured employee shall be compensated for the remainder of his or her income benefits out of the ISIF account.

In *Dumaw v. J. L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court set out the four requirements a claimant must meet in order to establish ISIF liability under Idaho Code § 72-332:

> (1) Whether there was indeed a pre-existing impairment.
> (2) Whether that impairment was manifest.
> (3) Whether the alleged impairment was a subjective hindrance.
> (4) Whether the alleged impairment in any way combines in causing total disability.

Dumaw, 118 Idaho at 155, 795 P.2d at 317.

26. Because it is only the last of these four requirements at issue in this proceeding, we can assume for purposes of discussion that Claimant can establish that she had a pre-existing impairment, that it was manifest, and that it was a subjective hindrance in obtaining employment. The focus of this proceeding is on the "combines with" portion of the test. Claimant contends that she sustained permanent disability as a result of her July 2000 occupational low back injury, which then combined with her pre-existing shoulder impairment to render her totally and permanently disabled. ISIF asserts that Claimant sustained no permanent injury from her July 2000 fall. She fully recovered from her injury with no permanent impairment and hence, no disability. Because she sustained no subsequent disability, she cannot satisfy the "combined effects" requirement of Idaho Code § 72-332(1)—there is no subsequent permanent injury to combine with her pre-existing impairment.

27. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of the evaluation. Idaho Code § 72-422.

"Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

No physician has opined that Claimant sustained any permanent injury or impairment as a result of her July 2000 occupational injury. Dr. Silver summed up the views of all of the physicians who saw or treated Claimant's low back problems when he opined that, at most, she suffered a "brief exacerbation and aggravation of an underlying condition." Ex. S, July 23, 2004 letter, p. 3. Dr. Silver did provide an impairment rating for Claimant that included her degenerative discogenic disease. He was explicit, however, that the portion of the impairment rating attributable to her spine *was not* related to the July 2000 industrial accident.

28. On this record, there is no evidence that the July 2000 fall caused Claimant any permanent injury. Because there was no permanent injury, no physician awarded Claimant an impairment rating that related to the July 2000 accident.

29. While the Commission is not bound by the opinions of the physicians in determining an impairment rating, it is wrong to suggest that the Commission may therefore award impairment when the record is devoid of any evidence that would support such an award. The Referee can find no basis to award any impairment when numerous physicians who saw and treated Claimant did not believe she sustained any permanent injury from or was entitled to any impairment attributable to the July 2000 accident. A claimant can have impairment without

disability, but there cannot be disability without impairment. The case of *Baldner v. Bennett's, Inc.*, 103 Idaho, 458, 461, 649 P.2d 1214 (1982) is instructive. In *Baldner*, the Supreme Court wrote:

> A claimant's impairment evaluation or rating is one component or element to be considered by the Commission in determining a claimant's permanent, partial disability, I.C. § 72-425, and is not the exclusive factor determinative of the disability rating fixed by the Commission. I.C. § 72-427. A disability rating may exceed the claimant's impairment rating. (Citations omitted.)

30. The Referee finds that Claimant's work-related accident of July 2000 caused only a temporary aggravation of her pre-existing degenerative condition. She sustained no permanent injury, no permanent impairment, and no subsequent permanent disability from her occupational injury. There was nothing for her pre-existing impairment to combine with to satisfy the combined effects requirements of Idaho Code § 72-332. Claimant has not shown ISIF to be liable.

CONCLUSIONS OF LAW

1. ISIF is not liable under I.C. § 72-332.

2. All other issues are moot.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this 15 day of November, 2005.

INDUSTRIAL COMMISSION

/s/_____
Rinda Just, Referee

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 18 day of November, 2005 a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

KEVIN E DONOHOE
PO BOX 5989
KETCHUM ID 83340-5989

THOMAS B HIGH
PO BOX 366
TWIN FALLS ID 83303-0366

djb /s/_____